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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1982

ROBERT BEGASSAT

Petitioner,

vs.

THE COSMOPOLITAN NATIONAL
BANK OF CHICAGO AS TRUSTEE
UNDER TRUST NO. 13199 AND
JOHN MAGNA

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

Lowell B. Komie
155 North Michigan Avenue
Suite 600
Chicago, Illinois 60601

John L. Gubbins
Three First National Plaza
Suite 2300
Chicago, Illinois 60602

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Appellate Court's disposition of petitioner's appeal by unpublished order violated his rights to due process?
2. Whether the Illinois Circuit Court's refusal to grant specific performance because of an affirmative defense which was neither pleaded nor proven but raised sua sponte after trial was a denial of due process?

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GROUND ON WHICH JURISDICTION
IS BASED

The Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1257(3). The order of the Illinois Supreme Court denying petitioner's Petition For Appeal As a Matter of Right and Petition For Leave to Appeal was entered October 5, 1982. The Illinois Appellate Court's Order Disposing Of Appeal Under Supreme Court Rule 23 was entered April 12, 1982. The Illinois Supreme Court stayed its mandate pending the filing and disposition of a petition for writ of certiorari to this Court. (Exhibits 1, 2 and 3)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution which recites in pertinent part:

" ... nor shall any State deprive any person of life, liberty, or property, without due process of law"

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STATEMENT OF THE CASE

Petitioner Robert Begassat seeks review of an unfavorable decision rendered after trial on his suit against respondents John Magna and the Cosmopolitan National Bank of Chicago for specific performance. Robert Begassat claimed to have exercised an option to purchase contained in a lease with respondents, and he requested the Circuit Court of Cook County to enforce the option provision. The Circuit Court refused and the Illinois Appellate Court in an unpublished order affirmed. The Illinois Supreme Court refused to review the decision of the Appellate Court.

On September 11, 1969 Robert Begassat entered into a lease with John Magna for a residence at 1404 N. LaSalle Street, Chicago, Illinois. The residence was a beautiful, old three floor mansion

and Robert Begassat who had just finished his studies at the University of Chicago moved downtown from Hyde Park. He decided to share rooms in the residence with other young career people in a cooperative living arrangement. Each resident contributed to the expenses and shared domestic tasks.

The initial lease was for 5 years beginning October 15, 1969 at a rental of \$700 monthly. It also gave Robert Begassat an option to purchase the property with an allowance of \$300.00 monthly for an agreed credit toward the purchase price. The price was to be determined by professional appraisal.

The landlord, John Magna, owned another residence immediately North of the leased property. Robert Begassat was given a Right of First Refusal on this property, 1406 N. LaSalle Street also to

be determined by appraisal.

In April, 1974, John Magna notified Robert Begassat that he'd found a potential buyer for 1406 N. LaSalle Street. Begassat exercised his right of first refusal on May 15, 1974. He accompanied this letter with a signed offer to purchase both properties and offered a price of \$116,000.00. He advised that each property had been appraised, 1404 N. LaSalle at \$46,000.00 and 1406 N. LaSalle at \$70,000.00.

John Magna refused the Offer to Purchase. On June 28, 1974, Begassat filed suit in Chancery in the Circuit Court of Cook County, Illinois to seek Specific Performance.

The parties entered into a settlement agreement and the suit was dismissed.

The settlement agreement established a new lease for 1404 N. LaSalle at \$850 monthly to June 30, 1975. The Option to purchase was kept in force but at a price of \$95,000. Begassat was again given a Right of Final Refusal on 1406 N. LaSalle Street at \$120,000 exerciseable by October 25, 1974. The settlement agreement also provided that if Magna breached the agreement "... Begassat shall have all of the right which he had prior to entering into this agreement and prior to the dismissal of said action ... Presumably, this would mean that in order to be restored to his status quo in the event of a breach by Magna, Begassat would (a) have the right to buy both buildings at their appraised value the date he first attempted to exercise his option, May 15, 1974 (b) receive a \$300 monthly credit against the purchase price from October 15, 1969, when he first took occupancy.

On March 26, 1976, Begassat attempted to purchase 1404 N. LaSalle at the price set forth in the Settlement Agreement, \$95,000. This time both parties signed a Sales Contract and their attorneys entered into an Escrow Agreement.

Begassat alleged that Magna did not comply with either the Contract or Escrow Agreement because he failed to cure various building code and building line violations. There were several openings in the basement of 1404 LaSalle Street leading to 1406 LaSalle Street that had to be closed. Magna did not do the work and according to Begassat intentionally prevented it from being done.

Begassat again filed a suit in Chancery in the Circuit Court of Cook County, Illinois, for

Specific Performance of his Option To Purchase 1404 N. LaSalle Street under the Contract of March 27, 1975. John Magna filed a Counterclaim for Forcible Detainer.

The Circuit Court of Cook County, Judge George A. Higgins found against Begassat and in favor of Magna on February 5, 1981. An order of eviction was entered against Begassat. (Exhibit 3) He then filed an Appeal to the Appellate Court of Illinois and in a summary opinion under Illinois Supreme Court Rule 23 his appeal was denied on April 12, 1982. (Exhibit 2 and 3) Begassat filed a Petition For Leave To Appeal to the Illinois Supreme Court. This was denied on October 5, 1982. On November 8, 1982 the Illinois Supreme Court Ordered a Stay pending filing of a Petition for Writ of Certiorari by December 9, 1982.

By October 15, 1982, Robert Begassat had lived

at 1404 N. LaSalle Street for 13 years. He should have earned \$46,800 in rental credits toward the purchase price. The original appraisal of the residence was \$46,000. If his allegation that Magna intentionally breached the contract by refusing to cure the building violations was correct, Begassat should by 1982 have acquired the property just by proper allocation of his rental credits. Instead he has been ordered evicted. This is an unconscienable forfeiture without due process of law. Illinois Supreme Court Rule 23 enabled the Illinois Appellate Court to strip Robert Begassat of his property without stated reason. The Constitution does not envision, an Appellate Court, however over burdened, abdicating its duty to provide a citizen with the reasons for its actions. The Rule 23 proceeding may be a short cut but it is a short cut to anarchy.

REASONS FOR ALLOWANCE OF WRIT

I.

THE ILLINOIS' APPELLATE COURT'S DISPOSITION OF PETITIONER'S APPEAL BY UNPUBLISHED ORDER VIOLATED HIS DUE PROCESS RIGHTS.

Illinois Supreme Court Rule 23 permits the appellate court to summarily dispose of a case by unpublished order. The Rule states in relevant part:

A case shall be disposed of by opinion when a majority of the panel deciding the case determined that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court; or (3) the decision is of

substantial public interest; or (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history.

* * *

All cases not required by the foregoing paragraph to be disposed of by opinion shall be disposed of by a written order which shall succinctly state the facts, the contentions of the parties, the reasons for the decision, the disposition, and the names of the participating judges. Orders are not precedential and will not be published.

The Appellate Court disposed of Begassat's appeal by unpublished order pursuant to Rule 23.

Although the concept of due process does not require appellate review, it is fundamental to ordered liberty that a court follow its own rules. In the instant case, the appellate court did not follow Rule 23 choosing instead to render an order not "stating" but hiding "the reasons for its decision." The result is an arbitrary decision lacking any reference to the issues and arguments which petitioner raised.

Begassat's brief before the Illinois Appellate Court raised four issues and cited numerous authorities in support of its arguments. The issues raised were stated as follows:

- I. The Trial Court's refusal to grant specific performance because of an affirmative defense which was neither pleaded nor proven but raised by the Trial Court, sua sponte, after

the trial was a denial of procedural due process.

- II. The Trial Court imposed a non-existent burden of proof on the Plaintiff.
- III. The Trial Court's judgment denying specific performance was contrary to equitable principles.
- IV. The Trial Court's judgment declared a forfeiture of the realty contract contrary to law.

The Appellate Court addressed only Issue III completely ignoring the other three issues including the first which raised serious constitutional deficiencies. Not only did the respondents make no effort to contradict, to distinguish or even to argue the appropriateness of the 25 reported decisions cited, all of which are relevant

and set forth current case law on the issues, but the Appellate Court failed to take up the other three issues in its order and refused to indicate any reasons for deciding them against petitioner.

Certainly the magnitude of the due process defect raised in the first issue merited a published opinion. It is an "important" issue which the Appellate Court had not settled definitively by published opinion. Thus under the rationale of sub (1) of Rule 23 the Appellate Court should not only have addressed the issue, it should have published an opinion giving its reasons.

In Hughes v. Rowe, 101 S. Ct. 173 (1980), this Court criticized the Seventh Circuit Court of Appeals for disposing by unpublished order of a case "purportedly having no precedential significance." Seventh Circuit Rule 35 governs publication and is almost identical to Illinois Supreme Court Rule 23. Noting that the issue raised was "novel",

this Court in a per curiam opinion summarily reversed expressing in passing its dissatisfaction with the use of Rule 35.

The wisdom of a rule such as Illinois Supreme Court Rule 23 is dubious. It promotes a lack of accountability and fosters judicial laziness and arbitrariness. It diminishes the care and attention devoted to the decision making process eroding the principle of stare decisis and thereby leading to a judicial system based on ad hoc decision making. Robert Begassat's appeal merited a more thoughtful consideration than that reflected in the Illinois Appellate Court's unpublished order. Rule 23 did not bring about judicial economy as intended but provided a rug under which novel and important issues could be swept.

II.

THE ILLINOIS CIRCUIT COURT'S REFUSAL TO GRANT SPECIFIC PERFORMANCE BECAUSE OF AN AFFIRMATIVE DEFENSE WHICH WAS NEITHER PLEADED NOR PROVEN BUT RAISED SUA SPONTE AFTER TRIAL WAS A DENIAL OF DUE PROCESS.

In announcing its decision following trial, the Circuit Court stated:

"That lack of communication between the parties thereto prevented the resolution of the existing differences and thereby rendered performance of said contract impossible."

In his Amended Answer To Complaint, Magna raised two affirmative defenses. First he contended that Begassat failed to pay Magna the \$16,000.00 required by paragraph 3(b) of the contract and that he further failed to appear

at the closing. Second, Magna contended that Begassat refused to abide by the lease of September 30, 1974. These affirmative defenses were answered by Begassat. Nowhere in the pleadings does Magna allege that the contract was impossible of performance. The Circuit Court's pronouncement after trial was the first occasion upon which the issue was raised.

By raising sua sponte after trial the defense of impossibility of performance, the Circuit Court violated Begassat's due process rights. The Court's announcement and finding took him by surprise, prevented him from questioning any evidence the Court considered in reaching its decision, and precluded him from offering evidence to the contrary.

The Fourteenth Amendment to the United States

"...nor shall any State deprive any person of life liberty, or property, without due process of law..."

Without question a substantial property interest is at stake here. Mr. Begassat stands to lose any interest and all his accumulated equity in the 1404 North LaSalle Street property.

The Court has repeatedly asserted the importance of elemental due process safeguards of notice and opportunity for a hearing. Concerning the notice guaranteed by due process this Court's mind is clear. "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. California* 355 U.S. 226, 228 (1958). Adequate notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable

opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." Application of Gault, 387, U.S. 1, 31 (1967) So also concerning the opportunity to be heard, this Court has made equally strong pronouncements. "The fundamental requisite of due process law is the opportunity to be heard." Giannis v. Ordean, 234 U.S. 385, 394 (1914) Effective opportunity at a minimum requires the chance "to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Goldberg v. Kelly, 397 U.S., 254, 267 (1970). Furthermore, effective notice requires that a litigant be "allowed to rebut the bases "for an adverse ruling or judgment." Millner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963)

Robert Begassat never had adequate notice nor

effective opportunity to be heard before the Circuit Court extinguished his interests in the 1404 LaSalle Street property. Magna never pled impossibility of performance of the contract. Nor did the Circuit Court prior to entering its verdict ever interject such a defense. The failure of the Circuit Court and Magna to notify Begassat that the impossibility defense was under consideration as a way of disposing of his suit denied him due process. It caught him by surprise and denied him the opportunity to question adverse testimony and offer evidence in opposition.

The Circuit Court's verdict offends the basic procedural principles of our system of law and must be condemned as a denial of due process. A judgment entered without notice of the issues a Court deems vital to a case and without the

opportunity to address those issues is an arbitrary declaration having no reference to the rights of the litigants.

CONCLUSION

To prevent manifest injustice and to protect petitioner's basic due process rights, Robert Begassat hereby prays this Court to grant the Petition for Writ of Certiorari for a plenary review of this case.

Respectfully submitted

Lowell B. Komie
155 North Michigan Avenue
Suite 600
Chicago, Illinois 60601

John L. Gubbins
Three First National Plaza
Suite 2300
Chicago, Illinois 60602

Dated: December 8, 1982